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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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Date	09/17/2013
Attachments	Opposers' Motion to Strike Applicant's Trial Brief.pdf(148840 bytes) Exhibit A.pdf(209174 bytes) Exhibit B.pdf(152359 bytes) Exhibit C.pdf(145175 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

OPPOSERS' MOTION TO STRIKE APPLICANT'S TRIAL BRIEF

Opposers ProMark Brands Inc. and H. J. Heinz Company (collectively, "Heinz") hereby move to strike the Trial Brief submitted by Applicant GFA Brands, Inc. ("GFA") on the ground that it is untimely. The initial scheduling order in this proceeding and multiple subsequent orders resetting the schedule, including the most recent, make clear that "**Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).**" (TTABVUE Doc. No. 2, emphasis in original, and TTABVUE Doc. Nos. 13, 29, 35, 44, 46, 48, and 50; *see also* TBMP § 801.02.) Applicant has failed to comply with this mandate.

Trademark Rule 2.128(a) provides that the trial brief of the party in the position of plaintiff is due 60 days after the date set for the close of its rebuttal testimony period. 37 C.F.R. § 2.128(a)(1). The trial brief of the party in the position of defendant, if filed, is due 30 days after the due date for the plaintiff's trial brief. *Id.* Heinz's rebuttal testimony period ended on June 13, 2013, pursuant to the Board's Order dated March 11, 2013. (TTABVUE Doc. Nos. 49 and 50.) Accordingly, Heinz's brief was due on August 12, 2013. Heinz's Trial Brief was timely filed and served on that date. (TTABVUE Doc. Nos. 82 and 83.) GFA's brief was due

on September 11, 2013. However, GFA failed to file its brief until September 17, 2013, *six days late*. Accordingly, GFA's Trial Brief is untimely and should be stricken by the Board.

"Litigation is run by rules designed to assure orderly conduct of the proceedings." *Chesebrough-Pond's Inc. v. Faberge, Inc.*, 618 F.2d 776, 780, 205 U.S.P.Q. 888, 891 (C.C.P.A. 1980). "One of those rules is the timely submission of briefs *unless an extension of time has been granted*." *Id.* (emphasis in original). GFA did not seek an extension of time or permission from the Board to file its brief late. To be sure, no extension of time had been granted.

GFA's failure to timely file its trial brief cannot be dismissed on the basis that its counsel is unsophisticated or unfamiliar with the applicable rules. GFA is represented by a well-regarded law firm with a national reputation, operating nine offices nationwide and employing nearly 500 attorneys. (A true and correct copy of the "Overview" and "Offices" webpages from Quarles & Brady's website is attached collectively hereto as Exhibit A.) The lead attorneys of record representing GFA in this proceeding both profess to be experienced in these types of proceedings. Mr. Cross's professional biography indicates that he "has extensive experience prosecuting and defending trademark . . . cases before the Trademark Trial and Appeal Board" (A true and correct copy of Mr. Cross's attorney profile from the Quarles & Brady website is attached hereto as Exhibit B.) Similarly, Ms. Levine's professional biography indicates that she has "extensive experience . . . representing businesses in trademark oppositions and cancellations." (A true and correct copy of Ms. Levine's attorney profile from the Quarles & Brady website is attached hereto as Exhibit C.) Particularly in light of their collective experience, there is no doubt that GFA's counsel should be well aware of the applicable rules.

Nor can GFA's failure to timely file its trial brief be dismissed as an isolated incident. To the contrary, GFA's conduct in this proceeding reflects a systematic disregard of the TTAB

Rules. For example, GFA elected not to make any opening expert disclosures and then was unable to timely disclose its so-called rebuttal experts, ultimately requiring more than three times the amount of time provided in the rules to submit its rebuttal expert disclosures. (*See* TTABVUE Doc. No. 82, App'x A "Opposers' Evidentiary Objections," setting forth in detail the procedural posture of GFA's expert disclosures.) Heinz has already moved to strike GFA's untimely and improper expert opinions and the testimony related thereto. Heinz submits that GFA's untimely trial brief should be stricken as well.

The language in Trademark Rule 2.128(a)(1) regarding the time for filing applicant's brief is unambiguous. GFA's brief was due on September 11, 2013. GFA's brief was filed late and should not be considered by the Board. Refusing to consider the brief is well within the Board's discretion and is a proper sanction against a party that has failed to adhere to the applicable rules. *See Green Bay Packers, Inc. v. Sebora*, Opp. No. 91120345, 2003 WL 1964050, at *2 (T.T.A.B. Apr. 18, 2003) (refusing to consider applicant's brief and granting opposer's request to strike the brief because it was untimely filed); *Information Builders, Inc. v. Bristol Techs., Inc.*, Opp. No. 91179897, TTABVUE Doc. No. 46, at 5 (T.T.A.B. Jan. 10, 2011) (finding that applicant's brief, filed four days after the deadline, was not filed in a timely matter and refusing to consider its contents).

For all of the foregoing reasons, Heinz respectfully requests that the Board strike and refuse to consider the contents of GFA's untimely trial brief.

Respectfully submitted,

Dated: September 17, 2013

By: /Angela R. Gott/

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CERTIFICATE OF SERVICE



The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via email, on this 17th day of September, 2013, to Counsel for Applicant:

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EXHIBIT A

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Overview

Quarles & Brady LLP provides broad-based, national-level legal services through a strong network of regional practices and local offices. In our Firm's distinguished 120-year history, we have grown from a small, well-respected local Milwaukee law firm to a place among the Am Law 200, building a national practice and earning a comparable reputation throughout the United States.

Our **lawyers** practice from offices in **Chicago**, Illinois; **Madison** and **Milwaukee**, Wisconsin; **Naples** and **Tampa**, Florida; **Phoenix** and **Tucson**, Arizona; **Shanghai**, China; and **Washington, D.C.** Through all the changes, one attribute has remained constant: We bring a common-sense, solution-oriented approach to our clients' complicated legal problems.

Our success has been based on the strength of our client relationships. It is our philosophy that we have reached our goals only when our clients' objectives have been met — and exceeded.


This reputation for client service is the natural result of excellent legal knowledge and high-quality counsel, delivered in a timely, direct and client-focused manner. Recognition has also come from our peers: 160 of the Firm's attorneys were selected for inclusion in *The Best Lawyers in America*® for 2013.

Our clients include major national and multinational corporations, educational and research institutions, municipalities and government agencies, nonprofits, charitable organizations, industry executives and high-net-worth individuals. Our attorneys have direct experience with a wide range of industries, from traditional manufacturing to leading-edge technology and nearly every point in-between: agriculture, energy, financial services, healthcare, insurance, pharmaceuticals and real estate, to name a few. We have the experience, resources and coverage to help our clients in nearly every aspect of modern business law.

As a Firm, we understand the difference between organization for efficiency and for organization's sake. Our practice groups are structured according to logical areas of legal knowledge; however, we deliver seamless, interdisciplinary counsel that take into account the unique qualities of our clients, their industries and their concerns.

Quarles & Brady is more than just a law practice. As offices and individuals, our attorneys and staff are cognizant of the opportunities they have to support their local and professional communities, offering leadership and volunteer services at every level. Whether providing **pro bono** legal counsel to the indigent, helping to mentor children, putting our commitment to **diversity** into practice or developing educational programs for industry groups, we are sincere in our goal of reflecting and giving back to our communities as well as our clients.


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Offices

Quarles & Brady LLP, with 450 attorneys, operates nine offices nationwide in Chicago, Illinois; Madison and Milwaukee, Wisconsin; Naples and Tampa, Florida; Phoenix and Tucson, Arizona; and Washington, D.C. as well as one international office in Shanghai, China.



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EXHIBIT B



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David R. Cross / Partner


Professional Experience

Dave Cross prosecutes and defends intellectual property and other technology cases before juries and judges in federal and state courts around the country. He also has extensive experience prosecuting and defending trademark and unfair competition cases before the Trademark Trial and Appeal Board (TTAB) and in state and federal courts. He has handled disputes involving a wide range of technologies and industries including biochemistry, computer software and hardware, plastics, medical instrumentation, and semiconductors. Dave is listed in *The Best Lawyers in America*® and has been selected for inclusion in the *Wisconsin Super Lawyers*® lists in intellectual property litigation.

- Mr. Cross successfully argued *Rexnord v. Kappos*, an important 2013 Federal Circuit decision that has gained national attention for clarifying the procedural rules for Patent Office appeals and for the application of the obviousness defense. "[Fed. Cir. Finds Patent Obvious](#)," *IP Law360*, January 23, 2013; "[Fed. Cir.: Appeals Board Should Consider Any Argument Supported by Record](#)," *The National Law Journal*, January 24, 2013; "[Federal Circuit: Appeals Board Should Consider Any Argument Supported by Record](#)," *The American Lawyer*, January 25, 2013.
- Mr. Cross recently led a team of Q&B lawyers in the successful defense of Metso Minerals, which had been accused by a competitor, Astec Industries, of patent infringement. The Q&B team obtained a judgment that the Astec patent was invalid. "[Astec Rock Crushers Patent Claims Invalid, Judge Rules](#)," *IP Law360*, December 6, 2012.
- Mr. Cross served as lead trial counsel for Metso Minerals in its trade secret theft, patent infringement, computer hacking and Lanham Act case against FLSmidth-Excel. The case settled shortly before trial in June 2010 with a \$25 million payment to Metso, the largest reported settlement or judgment in Wisconsin in 2010. "[Patent settlement largest reported outcome](#)," *Wisconsin Law Journal*, January 18, 2011.
- Mr. Cross has the unique experience of inventing his own patented consumer product, which he commercialized following his successful prosecution of trademark, copyright and patent lawsuits concerning his and competing products. His personal experience as a party to intellectual property litigation helps him bring a unique passion and perspective to intellectual property disputes and litigation.
- Mr. Cross successfully argued *Valu Engineering, Inc. v. Rexnord Corporation*, 278 F.3d 1268 (Fed. Cir.), an important Federal Circuit decision that clarified the functionality boundary between patent and trademark law.
- Mr. Cross also handles antitrust and trade regulation disputes involving the interplay between IP rights and the antitrust laws. Significant examples of his successes in these areas include *American Medical Transport v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 1990-1 T.C. ¶ 68, 962 (Wis. 1990) and *JPM, Inc. v. John Deere Indus. Equip. Co.*, 934 F.Supp. 1043, *aff'd* 94 F.3d 270 (7th Cir. 1996). These two cases created new law under the Wisconsin "Little Sherman Act" and Fair Dealership Law, respectively.

Representative Cases:

Metso Minerals Industries, Inc. v. Astec Industries, et al. (E.D. Wis.) (patent case involving the design of high performance conical rock crushers.); *Metso Minerals Industries, Inc. v. FLSmidth-Excel, et al.* (E.D. Wis.) (patent, trademark and trade secret case involving high performance mining equipment); *AFT v. J&L Fiber Services* (N.D.N.Y.) (patent case involving paper making equipment); *Standard Process v. Banks* (E.D. Wis.) (trademark and tortious interference case involving internet sales of dietary supplements); *Standard Process v. Total Health* (E.D. Wis.) (trademark and tortious interference case involving internet sales of dietary supplements); *Kelley Co. v. Rite-Hite Corp.* (E.D. Wis.) (Lanham Act claim between competitors in the dock leveling industry); *Duchow Marine v. Skipper Bud's* (Mil. Co. Cir. Crt.) (false advertising and trade defamation claim between boat dealers); *Briggs, Inc. v. Martlet Importing Co., Inc.*, (D. Me. and 1st Cir.) (trade regulation case involving beer distribution); *California Raisin Advisory Board v. Kupper* (E.D. Wis.) (copyright case involving the Dancing Raisins television advertisements); *Crown Equipment Corporation v. Raymond Corporation*, (N.D. Ohio) (patent case involving computerized controllers for fork lift trucks); *Envirex Inc. v. K.H. Schussler fur Umwelttechnik GMBH*, (E.D. Wis.) (patent case involving water purification devices); *Genroco International, Inc. v. Avnet, Inc.*, (E.D. Wis.) (business tort and UCC case involving computer software and hardware); *Habasit Belting Incorporated v. Rexnord Industries, Inc.*, (D. Del.) (patent case involving material handling equipment); *Harvard v. Pharmacia*, (D.N.J.) (patent case involving DNA sequencing techniques); *Jordan Sage v. Marvin Lee Aday, a/k/a Meat Loaf*, (E.D. Wis.) (copyright case involving song lyrics); *MGE UPS Systems, Inc. v. JT Packard, et al.*, (D. Tenn.) (trade secret, copyright and Sherman Act case involving software for uninterrupted power supply equipment); *Manpower International Inc. v. Cross Promotions, Pty Ltd.*, (C.D. Cal. and 9th Cir.) (Lanham Act case involving temporary employment services); *Miller Brewing Company v. Anheuser-Busch*, (E.D. Wis.) (Lanham Act case involving Great Taste - Less Filling television advertisements); *Pfizer v. Apogent*, (D.N.J.) (patent case involving lateral flow immunoassays); *Picker v. Mayo Clinic*, (D. Ohio) (patent case involving magnetic resonance imaging devices); *Professional Dental Technologies, Inc. v. Alcteholaget Svensk Edental*, (E.D. Wis.) (patent case involving dental appliances); *RHH Foam v. Clayton Corporation*, (E.D. Wis.) (patent case involving foam insulation); *Slowiak v. Land O'Lakes, Inc.*, (E.D. Wis. and 7th Cir.) (Sherman Act case involving dairy product distribution); *Team Electronics v. Apple Computer, Inc.*, (W.D. Wis.) (trade regulation case involving personal computers); *Versa Technologies, Inc. v. Lippert Components, Inc.*, (E.D. Wis.) (patent case involving RV equipment); *Wisconsin Pharmacal Co. v. Repello Products, Inc.*, (W.D. Wis.) (Lanham Act case involving insect repellants).

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Education and Honors

- University of Chicago Law School (J.D., 1980)
- University of Wisconsin (B.A., 1976)
Phi Beta Kappa

Bar Admissions

Wisconsin, 1981

Court Admissions

U.S. District Court, Eastern District of Wisconsin, 1981
 U.S. District Court, Western District of Wisconsin, 1981
 U.S. Court of Appeals, 7th Circuit, 1983
 U.S. Court of Appeals, Federal Circuit, 1994
 U.S. Court of Appeals, 9th Circuit, 1995
 U.S. Court of Appeals, 1st Circuit, 1995
 U.S. District Court, Central District of Illinois, 1996
 U.S. District Court, Northern District of Illinois, 2001
 U.S. District Court, Northern District of Indiana, 2004
 U.S. District Court, District of Colorado, 2005
 U.S. Court of Appeals, 11th Circuit, 2006
 U.S. Court of Appeals, 6th Circuit, 2006
 U.S. District Court, Eastern District of Texas, 2008

Professional Recognition

- Listed in *The Best Lawyers in America*® (2009-present: Commercial Litigation / Litigation - Antitrust / Litigation - Intellectual Property / Litigation - Patent).
- Recognized as *Best Lawyers*® 2013 Milwaukee Litigation Law "Lawyer of the Year."
- Selected for inclusion in the 2008-2010 *Wisconsin Super Lawyers*® lists (Intellectual Property Litigation).
- Member of the *Wisconsin Super Lawyers* Blue Ribbon Panel for IP Litigation.
- Honorary Court Commissioner, Milwaukee County Circuit Court.
- Martindale-Hubbell AV® Peer Review Rated.
- Selected as a 2013 Top Rated Lawyer in Technology by American Lawyer Media and Martindale-Hubbell™.

Professional and Civic Activities

Mr. Cross is a member of the State Bar of Wisconsin; the American Bar Association (Member, Litigation Section); the Milwaukee Bar Association; the Bar Association of the Seventh Circuit and the Wisconsin Intellectual Property Law Association.

Chair, Board of Directors of the Intellectual Property Law Section of the Wisconsin Bar Association, 2008.

Mr. Cross's community service has included: Children's Outing Association (Director, 1983-1987); The Counseling Center of Milwaukee (Director, 1987-1998; President, 1996-1998); University of Wisconsin Memorial Union Building Foundation (Associate Trustee, 2002-present); North Suburban Special Olympics (Assistant Coach, 2002-present).

Selected Presentations/Publications



Mr. Cross speaks and writes on intellectual property law topics, trade regulation issues and trial practice techniques. His publications and presentations include:

- Quoted, "[Fed. Circ. Could Take The Coin Flip Out Of Patent Appeals](#)," *Law360*, March 22, 2013.
- Featured, "[Q&A With Quarles & Brady's Dave Cross](#)," *Law360*, March 15, 2013.
- Quoted, "[Federal Circuit: Appeals Board Should Consider Any Argument Supported by Record](#)," *The American Lawyer*, January 25, 2013.
- Quoted, "[Federal Circuit: Appeals Board Should Consider Any Argument Supported by Record](#)," *The National Law Journal*, January 24, 2013.
- Quoted, "[Top Court's Denial Won't Be Last Word On Claim Construction](#)," *IP Law360*, January 8, 2013.
- Quoted, "[IP Cases To Watch In 2013](#)," *IP Law360*, January 1, 2013.
- Quoted, "[Astec Rock Crushers Patent Claims Invalid, Judge Rules](#)," *IP Law360*, December 6, 2012.
- Co-presenter (with Nicole Druckrey), "The Problem: Mobile Employees in the Digital Age," Quarles & Brady Business Law Training, June 16, 2011.
- Quoted, "[Patent settlement largest reported outcome](#)," *Wisconsin Law Journal*, January 18, 2011.
- Presenter, "Mobile Employees in the Digital Age: A Threat to Company Secrets and Fair Competition," 2010 Annual Ethics Seminar, November 12, 2010.
- Panelist, "The Efficient Administration of Justice," 2010 Eastern District of Wisconsin Bar Association Annual Meeting.

- "Patent Lawsuits," The Medical College of Wisconsin, 2010.
- "The IP Year in Review," IP Section, 2008 Wisconsin Bar Association Annual Convention.
- "The Attorney/Client Privilege and Willfulness After *Seagate*," Milwaukee Bar Association, 2008.
- "IP Law for Government Lawyers," Wisconsin Bar Association Seminar, 2008.
- "Remedies for Patent Infringement," guest lecturer, Marquette University Law School, 2005.
- "*Traffix Devices, Valu Engineering* and the 'Functionality' Boundary Between Trade Dress and Patent Law," Wisconsin Intellectual Property Law Association, 2003.
- "E-commerce and Trademark Law: Old Wine in New Bottles (and Some New Wine Too!)," Business Marketing Association Milwaukee Chapter, 2000.
- "Cheesehead Wars: A Case Study in Enforcing IP Rights," Quarles & Brady seminar, 1999.
- "Defending the Right to Compete," Quarles & Brady seminar, 1999.
- "The Race to the Courthouse: Aggressive Strategies for the Potential Defendant," Quarles & Brady seminar, 1997.
- "Constructive Termination Under the Wisconsin Fair Dealership Law," *Wisconsin Lawyer*, July 1997.
- "Distributor Terminations," Quarles & Brady seminar, 1994.
- "Amended Rules of Civil Procedure," CPM Seminar Systems presentation, 1993.
- "The Application of the Attorney/Client Privilege and the Work Product Doctrine to Communications with Fiduciaries," Milwaukee Bar Association presentation, 1992.
- "Representing and Suing the Foreign Defendant in Wisconsin Courts," CPI Seminar presentation, 1986.

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Marta S. Levine / Partner

Professional Experience
 Marta Levine practices in the areas of trademark and copyright law. She has extensive experience in representing businesses in the protection of their trademark and copyright rights, including:

- Representing businesses in selecting and clearing trademarks (including assisting in investigation of other companies' trademarks).
- Representing businesses in the registration of trademarks with the U.S. Patent and Trademark Office (including prosecuting applications and representing businesses in trademark oppositions and cancellations).
- Representing businesses in trademark licensing.
- Representing businesses in disputes over trademark rights.
- Representing businesses in registering trademarks in foreign countries, including prosecuting foreign trademark applications and representing clients in trademark oppositions, infringement litigation, and licensing.
- Representing businesses in registering copyrights with the U.S. Copyright Office.
- Representing businesses in disputes over copyright rights.

Education and Honors

- University of Maryland School of Law (J.D., *cum laude*, 1983)
- University of Pennsylvania (B.A., *cum laude*, 1975)

Bar Admissions
 Wisconsin, 1984
 Maryland, 1983

Court Admissions
 U.S. District Court, District of Maryland, 1984
 U.S. Court of Appeals, 4th Circuit, 1984

Professional Recognition
 Martindale-Hubbell AV® Peer Review Rated.


Professional and Civic Activities
 Member: International Trademark Association ("INTA"); Wisconsin Intellectual Property Law Association; American Bar Association (Member, Intellectual Property and Commercial Law Sections); State Bar of Wisconsin (Member, Intellectual Property and Business Law Sections); Milwaukee Bar Association; Maryland State Bar Association.

Selected Presentations/Publications

Presentations:

- "Untangling the Mysteries of Trademarks; How to Choose Them — How to Use Them," presentation, April 2002.
- "Basic Federal Trademark Law," Lorman Business Institute, February 2001.
- "Trademark Selection, Clearance, and Use," November 1999.
- "Trademarks in Business Practice," September 1998.
- "What Businesses Should Know About Copyrights," 1998.
- "Registration of Trademarks and Service Marks," 1993.

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